ELMER L. LOWE

IBLA 83-552 Decided April 3, 1984

Appeal from decision of the Utah State Office, Bureau of Land Management, rejecting request for an amendment of patent No. 225698.

Affirmed.

1. Patents of Public Lands: Generally--Surveys of Public Lands: Generally

   A survey of public lands creates and does not merely identify the boundaries of sections of land. A patentee of public land takes according to the actual survey on the ground, even though the official survey plat may not show the tract as it is located on the ground, or the patent description may be in error as to the course or distance or the quantity of land stated to be conveyed.

2. Conveyances: Generally--Federal Land Policy and Management Act of 1976: Correction of Conveyance Documents--Patents of Public Lands: Amendments

   Under sec. 316 of the Federal Land Policy and Management Act of 1976, the Secretary of the Interior has discretionary authority to correct an error in a conveyance document when the error is clearly established and equitable considerations dictate that relief be granted. BLM's rejection of an application to amend a homestead patent to include additional acreage will be affirmed where the record does not support a finding that the original patentees had entered those lands, nor was there ever any intent to enter such lands as part of the original homestead entry.

APPEARANCES: Elmer L. Lowe, pro se; David K. Grayson, Esq., Assistant Regional Solicitor, Department of the Interior, Salt Lake City, Utah, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Elmer L. Lowe has appealed from a decision of the Utah State Office, Bureau of Land Management (BLM), dated March 23, 1983, which denied his request to amend patent No. 225698 to include additional acreage.

On October 1, 1981, Lowe filed his request to amend patent No. 225698 to include lots 7 and 8, in place of lots 3 and 4 in sec. 4, T. 36 S., R. 9 W., Salt Lake meridian, Utah. The patent was originally issued September 21, 1911, to his predecessors, the heirs of Collins W. Clark, for homestead entry No. 14822, and described the land entered as the S 1/2 SW 1/4, sec. 33, T. 35 S., R. 9 W., and lots 3 and 4, sec. 4, T. 36 S., R. 9 W., Salt Lake meridian, Utah, containing 151.20 acres. However, the record shows, and BLM clearly admits, that an overlap in the original surveys of T. 36 S., R. 9 W., and T. 35 S., R. 9W., created a substantial acreage deficiency in the patent. 1/ Because of this overlap in the surveys, portions of the patent also overlapped and the patentees did not receive the amount of the acreage recited in the patent.

In order to understand how this problem arose it is necessary to set out, in some detail, the chronology of relevant events. In 1874, T. 35 S., R. 9 W., Salt Lake meridian, was surveyed by A. J. Stewart. The survey plat was approved on March 12, 1875. In 1897, T. 36 S., R. 9 W., Salt Lake meridian, was surveyed by Washington Jenkins and Joseph A. West. The survey plat was approved April 2, 1900.

In the 1897 survey, the south boundary of T. 35 S., R. 9 W., was retraced in connection with the survey of the north boundary of T. 36 S., R. 9 W. Jenkins and West claimed to have found the 1874 survey markers approximately 16.00 chains north of where the record indicated they would be located, and the surveryors established closing corners for T. 36 S., R. 9 W., on this retracement line.

On August 23, 1901, Collins W. Clark made homestead entry No. 14822 for the S 1/2 SW 1/4 sec. 33, T. 35 S., R. 9 W., and lots 3 and 4, sec. 4, T. 35 S., R. 9 W. Assuming that both the Stewart survey and the Jenkins-West survey were accurate, lots 3 and 4 would have abutted the south boundary of the S 1/2 SW 1/4 sec. 33. On July 8, 1902, the entryman was killed in an accident. Three years later, the entryman's wife died. Thereafter, final proof was submitted on September 28, 1908, by Edgar L. Clark, brother of the entryman, on behalf of the minor heirs of the entryman.

On December 18, 1908, the Regional Forester filed a protest to the homestead application with the register and receiver. As grounds thereof, he alleged that neither the entryman nor his wife and children had ever established residence on the land, nor had they cultivated any part of the entry. The land was apparently used for summer grazing of cattle which were allowed to roam free, there being no fences constructed on the entry.

1/ Appellant has argued that the deficiency aggregated 71.20 acres, a figure presumably derived by subtracting the 80 acres granted in the S 1/2 SW 1/4, sec. 33, T. 35 S., R. 9 W., from the patent's total acreage figure. In actual fact, however, the overlap was not complete. A review of the Master Title Plat indicates that slightly more than 2 acres of land in both lots 3 and 4 were properly patented pursuant to the homestead entry. Thus, the actual deficiency is approximately 67 acres.

Various reports and investigations were thereafter filed which generally supported the allegations made, but which also noted that the land was unsuitable for agricultural purposes, being suited only for grazing, and that it was a common practice in the area for individuals in the area to pasture their animals in the summer months on the higher elevations and construct dwellings which were used as residences during these months.

The protest, however, was ultimately disallowed under the rule enunciated in Hensley v. Buford's Heirs, 29 L.D. 275 (1899), wherein Secretary Hitchcock had noted that so long as there had been no forfeiture of an entry prior to the death of the surviving parent, an entry being processed on behalf of the minor heirs of the entryman was not subject to default for failure to comply with any statutory requirement. As Secretary Hitchcock held, "The fact of their being infant children and the death of their parents was all that was required to establish their right to the land and to a patent." Id. at 276. 2/ Pursuant to this rule, patent issued on September 21, 1911, to the land described in the entry, viz., S 1/2 SW 1/4 sec. 33, T. 35 S., R. 9 W., and lots 3 and 4, sec. 4, T. 36 S., R. 9 W.

In 1924-28, Andrew Nelson and Eliot Bird conducted dependent resurveys in T. 35 S., R. 9 W., and also the north tier of sections in T. 36 S., R. 9 W., with both prior surveys being reestablished and remonumented on the ground. During the resurveys the record indicates that Nelson and Bird found the original 1874 survey corners for the south boundary of T. 35 S., R. 9 W., and also the original 1897 survey corners for the north boundary of T. 36 S., R. 9 W. The 1897 corners set by Jenkins and West were discovered approximately 16.00 chains north of the 1874 surveyed boundary, thus showing an overlap between the two surveys. Additionally, it was disclosed that T. 36 S., was offset approximately one-fourth mile to the west so that there were no common section corners between any of the abutting sections in T. 36 S., and those in T. 35 S. The resurvey plats for T. 36 S., R. 9 W., and T. 35 S., R. 9 W., were approved October 31, 1929, and February 15, 1930, respectively.

In effect, what the 1929 and 1930 resurveys disclosed was that lot 3 of T. 36 S., described land almost totally within S 1/2 SW 1/4 sec. 33, T. 35 S., while lot 4 described land partially within the S 1/2 SW 1/4 sec. 33 and also partly within the SE 1/4 SE 1/4 sec. 32. Thus, to the extent that the homestead patent described lot 3, it was, in effect, merely redescribing land which was already within the S 1/2 SW 1/4 sec. 33. Similarly, lot 4 was partially within the S 1/4 SW 1/4 sec. 33 and, to the extent it was in sec. 32, the homestead patent was equally ineffective to transfer ownership since that was a school section which had passed to the State of Utah upon its admission to the Union on July 16, 1894. Thus, except for two small slivers of land which lay north of lots 5 and 6, but below the south township line for T. 35 S., no land passed in the patent pursuant to the description of lots 3 and 4, sec. 4, T. 36 S., save for that which had already been described as the S 1/2 SW 1/4 sec. 33, T. 35 S.

2/ This holding was premised on the Supreme Court's decision Bernier v. Bernier, 147 U.S. 242 (1893), which had interpreted the provisions of Rev. Stat. 2291 and 2292, 43 U.S.C. § 171 (1970), repealed, except for Alaska, by section 702 of FLPMA, 90 Stat. 2787.

As noted above, on October 1, 1981, Elmer S. Lowe, a great-grandson of the entryman's wife, filed an application with the Utah State Office asking to amend the homestead patent to substitute lots 7 and 8, sec. 4, T. 36 S., R. 9 W., for lots 3 and 4, which, he alleged, had "been eliminated from my original patent through an erroneous survey made in 1897 by Jenkins and West." An investigation of appellant's claim was thereupon undertaken. By letter of January 11, 1983, the Chief, Branch of Land and Minerals Operations, informed appellant that a review of the records indicated that "it appears that acreage was lost as a result of theoverlapping surveys and not because of an error in the land description in the original survey." Appellant, however, was afforded an opportunity to establish that the original entryman actually entered lots 7 and 8, sec. 4, T. 36 S., and that the patent had erroneously failed to include these lands.

In his response, appellant noted that he had never claimed that lots 7 and 8 had been entered by Clark. Rather, he argued:

> My Great Granmother Brown complied with all the rules and regulations and met the requirements to prove up on the land she had homesteaded, the same as any other citizen of the United States of America that homesteaded land at that time. Undoubtedly she would have taken up additional land if she had been aware of the conflicts of the surveys at that time. The fact remains that the United States Government owes my Great Grandmother Brown's Patent No. 225698, 71.20 acres of land, equal to what she homesteaded.

Subsequently, by decision dated March 22, 1983, the State Office denied appellant's request to amend the homestead patent. In its decision, the State Office noted that correction of patents was authorized by section 316 of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2770, 43 U.S.C. § 1746 (1976). The purpose for this section, according to BLM, was "to allow the Secretary to correct land descriptions in patents where such descriptions differ from the actual on-the-ground entry." Under such an analysis, an amendment could only be approved where the land sought was the land which the original entryman had intended to enter. Since appellant admitted that this was not the case insofar as lots 7 and 8 were concerned, there was no statutory basis on which to base the amendment which appellant sought. Appellant timely appealed this decision.

In his statement of reasons in support of the appeal, appellant challenges the State Office decision arguing that "Section 316 is broadly enough worded and the intent purposely created to allow them, as the agency of the U.S. Government impowered to correct errors of the very nature of this one, to enable them to correct the error created through the issuance of the patent." (Emphasis in original.)

The Assistant Regional Solicitor has responded, on behalf of BLM, that appellant's request has properly been denied because there is no legal authority to grant the amendment pursuant to section 316 of the FLPMA, 43 U.S.C. § 1746 (1976), where the requested lands were never entered in connection with patent No. 225698.

[1] Before discussing the specific issue presented by this appeal, it is useful to review certain established principles relating to public land

surveys. It has long been recognized by this Department that a survey of public lands creates and does not merely identify the boundaries of sections of land. A patentee of public land takes according to the actual survey on the ground, even though the official survey plat may not show the tract as it is located on the ground, or the patent description may be in error as to the course or distance or the quantity of land stated to be conveyed. United States v. Heyser, 75 I.D. 14, 18 (1968), and cases cited therein. Traditionally, it has been held that the description of the land by legal subdivisions, as defined by the corners of the surveys upon which the description is based, determines the quantity of land which is conveyed by the patent, regardless of the acreage figure stated in the patent. Albert Freitag, A-26258 (Jan. 3, 1952); J. M. Beard (On Rehearing), 52 I.D. 451 (1928). Accordingly, the original patentees in this case could only have taken title to the tract of land in question as described within patent No. 225698 as it existed on the ground, irrespective of what acreage was actually stated in the document. We note that the courts have accorded this same treatment where a patent has issued based on two overlapping surveys both conducted prior to patent issuance. See United States v. Reimann, 504 F.2d 135 (10th Cir. 1974). Thus, the actual land described by the patent rather than the acreage calculation contained in the patent determines the amount of land conveyed. Since the patent described some of the same land twice, it clearly miscalculated the acreage figure.

[2] Appellant seeks this amendment under section 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1746 (1976), which specifically provides:

> The Secretary may correct patents or documents of conveyance issued pursuant to section 208 of this Act or to other Acts relating to the disposal of public lands where necessary in order to eliminate errors. In addition, the Secretary may make corrections of errors in any documents of conveyance which have heretofore been issued by the Federal Government to dispose of public lands.

Section 316 of FLPMA, supra, replaced various provisions of prior laws which were, themselves, repealed by FLPMA. Two different types of error are subject to correction. The first type involves typographic or transcription errors appearing on a patent or other conveyancing document, where the patent does not match the description in the application or entry. The second type involves the more substantive problem where the patent describes the land as described in the application or entry, but the description does not match the land entered or intended to be entered on the ground. The instant case, however, does not involve either situation.

It is clear that we are not faced with a typographical error. Nor has appellant shown that the entryman intended to enter lots 7 and 8. Indeed, appellant admits that this was not the case. Rather, appellant's theory is that since the entryman thought that there was a total of 151.20 acres, whereas in actuality there was considerably less, the Government is obliged to amend the patent issued to include other lands which the entryman might have entered had he been aware of the deficiency in acreage. Section 316,

however, is designed to permit the "correction" of a patent where the land described is different from the land sought. Herein, appellant's predecessor-in-interest received a patent embracing the land he sought, though he was misinformed as to the acreage involved. 3/ But as noted above, it is not the acreage figure that controls what is patented, but the land description of the patent as defined by the corners of the survey on which it was based. We hold that where a party has received a patent which accurately describes the lands entered or intended to be entered, the mere fact that the acreage figure used is erroneous is insufficient to vest the Department with authority to amend the patent to include therein other lands, which were neither entered nor intended to be entered, in order to make up the acreage deficiency. BLM properly rejected appellant's application.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James L. Burski
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Edward W. Stuebing
Administrative Judge

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3/ We note, however, that insofar as lot 4 actually invaded sec. 32, the patent purported to embrace lands already conveyed to the State of Utah pursuant to its Statehood grant. The respective rights of both appellant and the State to this parcel is a matter properly committed to a court of competent jurisdiction.